

EDITOR'S NOTE

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QUESTIONS PRESENTED

I.

DOES THIS COURT HAVE JURISDICTION TO REVIEW THE CASE WHERE THE KENTUCKY SUPREME COURT EXPRESSLY STATED THAT THE CASE WAS DECIDED UNDER THE KENTUCKY CONSTITUTION "[W]ITHOUT EXPRESSING ANY VIEW AS TO THE RESULT WHICH WOULD BE REACHED IN THIS CASE BY APPLICATION OF THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND APPLICABLE DECISIONS OF FEDERAL COURTS"?

II.

DID THE SUPREME COURT OF KENTUCKY CORRECTLY HOLD THAT IT IS UNCONSTITUTIONAL FOR THE POLICE TO MAKE A FORCED, WARRANTLESS ENTRY INTO A PERSON'S MOTEL ROOM ON THE ASSERTION THAT IT WAS FOR PERSONAL SAFETY, PARTICULARLY WHERE THE JUDGE WHO ISSUED A WARRANT FOR A CAR HAD REFUSED TO ISSUE A WARRANT FOR THE ROOM?

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NO. 89-1182

COMMONWEALTH OF KENTUCKY

PETITIONER

VS.

CHARLES DAVID JOHNSON

RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF KENTUCKY

RESPONDENT'S BRIEF IN OPPOSITION

The respondent, Charles David Johnson, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the opinion of the Supreme Court of Kentucky in this case. That opinion is reported as Commonwealth v. Johnson, Ky., 777 S.W.2d 876 (1989).

REASONS WHY THE PETITION
SHOULD BE DENIED

I.

THERE IS AN ADEQUATE AND INDEPENDENT STATE GROUND FOR THE JUDGMENT OF THE SUPREME COURT OF KENTUCKY.

The petitioner seeks review of the decision of the Supreme Court of Kentucky. The decision of the Supreme Court of Kentucky was based exclusively on the state constitution. Indeed, the Supreme Court of Kentucky expressly stated that it

was not expressing any view on how the case would be decided under the United States Constitution and applicable decisions of Federal Courts:

Without expressing any view as to the result which would be reached by application of the Fourth Amendment to the Constitution of the United States and applicable decisions of Federal Courts, we hold that the warrantless, forced entry by the police into appellant's room at the Ramada Inn, violated Section 10 of the Constitution of Kentucky, and the evidence found therein must be suppressed. On this issue, we affirm the Court of Appeals. A 5-6. Emphasis added.

Since the judgment of the Supreme Court of Kentucky was based exclusively on state law, this Court lacks jurisdiction to review the case. See Henry v. Mississippi, 379 U.S. 443, 85 S.Ct. 564, 567 (1965) ("under the view taken in Murdock of the statutes conferring appellate jurisdiction on this Court, we have no power to revise judgments on questions of state law"). "Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground." Michigan v. Long, 463 U.S. 1032, 103 S.Ct. 3469, 3476, 77 L.Ed.2d 1201 (1983).

II.

IF THE SUPREME COURT OF KENTUCKY HAD RELIED UPON THE FOURTH AMENDMENT, THE DECISION HOLDING THE SEARCH ILLEGAL STILL WOULD HAVE BEEN CORRECT.

As mentioned above, the Supreme Court of Kentucky did not decide this case under the United States Constitution. Rather, the Court expressly stated that it was deciding the case under the Kentucky Constitution. However, even if the Court had decided the case under the United States Constitution, the decision holding the search illegal still would have been correct.

At the outset, the Court should note that the police in the case at bar had sought a warrant for respondent's car and his motel room at the Ramada Inn. See Affidavit in Support of Search Warrant, A 16-17. However, the district judge specifically determined that the police did not have probable cause to search the room by issuing a warrant only for respondent's car. A 18.

Having been denied permission to enter respondent's room by the district judge who would only issue a search warrant for the car, the police decided they would force their way into the room on the claim that it was necessary for their personal safety. This forced, warrantless intrusion into respondent's motel room was patently illegal.

The evidence relevant to this issue includes the following:

Around 10:00 a.m. on September 17, Officer Ron Wietholter was at the Ramada Inn on personal business when he observed respondent acting suspiciously by moving objects around in his car. TE III, 201-203. Officer Wietholter notified Chief Weaver of this suspicious activity at 4:00 p.m. on September 17, 1985. TP Nov. 18, 3.

At 5:15 p.m. on September 17, Officer Eldridge of the Airport Police Department brought his dog trained in drug detection to the motel and they walked the dog around respondent's car in the rear parking area of the motel. TP Nov. 18, 3. The dog reacted in a positive manner for the presence of controlled substances. TP Nov. 18, 4.

The police then obtained a warrant to search respondent's car and was denied a warrant to search his room. TP Nov. 18, 4, A 18.

For the purpose of executing the warrant for the car, the police went to respondent's room to get a key and to determine if respondent wanted to accompany them on the search. TP Nov. 18, 5.

Respondent's door was open about an inch. TP Nov. 18, 6. The police knocked on the door and identified themselves as police officers. TP Nov. 18, 6.

When respondent saw who was outside his room, he attempted to close the door. TP Nov. 18, 6. The police prevented him from closing the door. TP Nov. 18, 6.

The police then had respondent step out into the hallway wearing only his underclothing and a pair of boots. TP Nov. 18, 6-7.

At this point, the police had not seen any contraband or controlled substances. TP Nov. 18, 7.

Respondent stepped out into the hall as instructed and closed the door behind him. TP Nov. 18, 7.

Respondent told the police he wanted to accompany them on the search of his car. TP Nov. 18, 7. A police officer then got a pass key so that respondent could get back in his room and get his clothing. TP Nov. 18, 8.

When respondent entered his room, he attempted to close the door. TP Nov. 18, 8. The police again kept him from closing the door "for our own personal safety." TP Nov. 18, 9-10.

Two to three police officers then went into respondent's room without respondent's permission to do so. TP Nov. 18, 9-10. Respondent then put his clothes on. TP Nov. 18, 10.

While in the room, the police observed drug paraphernalia and drug contraband. TP Nov. 18, 10. The police acknowledged that they could not have gotten a search warrant for the room without entering the room. TE II, 118.

After the police watched respondent dress, they went with him to the car. TP Nov. 18, 11. The car was searched but no contraband items were found in the car. TP Nov. 18, 12.

The police then obtained a search warrant for respondent's room based upon what they had seen while in the room. TP Nov. 18, 14-15.

The police had information that respondent carried firearms. TP Nov. 18, 15-16.

The Fourth Amendment "protects people from unreasonable government intrusions into their legitimate expectations of privacy." United States v. Chadwick, 433 U.S. 1, 97 S.Ct. 2476, 2481, 53 L.Ed.2d 538 (1977). A person has a legitimate expectation of privacy in a hotel room that he rents. In Stoner v. California, 376 U.S. 483, 84 S.Ct. 889, 893, 11 L.Ed.2d 856 (1974), the Supreme Court made it clear that "a guest in a hotel room is entitled to constitutional protection against unreasonable searches and seizures." See also United States v. Lyons, 706 F.2d 321, 326 (D.C. App. 1983); United States v. Killebrew, 560 F.2d 729, 733 (6th Cir. 1977); United States v. Bulman, 667 F.2d 1374, 1383-1384 (11th Cir. 1982); Shanks v. Commonwealth, Ky., 504 S.W.2d 709, 711 (1974).

The decisions of this Court make it clear that only in "a few specially established and well-delineated" situations may a warrantless search of a dwelling withstand constitutional scrutiny. Vale v. Louisiana, 399 U.S. 30, 90 S.Ct. 1969, 1972, 26 L.Ed.2d 409 (1970). More recently, in Payton v. New York, 445 U.S. 573, 100 S.Ct. 1371, 1374-1375, 63 L.Ed.2d 639 (1980), the Court held that the Fourth Amendment prohibits the police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest and observed:

In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant. Id., 100 S.Ct. at 1382.

In the case at bar, the police literally forced their way into respondent's motel room. TP Nov. 18, 8, 9-10. The police did not have a warrant that authorized their entry into this room. On the contrary, the district judge had specifically determined the police did not have probable cause to search the room by issuing a search warrant for only Mr. Johnson's car even though the police asserted in their initial affidavit that they believed drugs were in both the room and car. See A 16; A 18.

The forced, warrantless entry into respondent's room clearly constituted a search and seizure within the meaning of the Fourth Amendment. See Segura v. United States, 468 U.S. 796, 104 S.Ct. 3380, 3382, 3389, 82 L.Ed.2d 599 (1984). See also dissenting opinion at 104 S.Ct. 3394-3396.

In United States v. Winsor, 846 F.2d 1569, 1572-1573 (9th Cir. 1988), the Court addressed the question of "whether the police conducted a search within the purview of the Fourth Amendment when they looked into Winsor's room through the open door while standing in the corridor" after they had demanded that the door be opened. The Court held that "the police did effect a 'search' when they gained visual entry into the room through the door that was opened at their command." Id., p. 1573.

"It is fundamental that warrantless searches and seizures are unreasonable within the meaning of the Fourth Amendment unless they fall within one of the few, well-delineated exceptions to the warrant requirement." United States v. Segura, 663 F.2d 411, 414 (2nd Cir. 1981), citing Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 2043, 36 L.Ed.2d 854 (1973) and Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 2031-2032, 29 L.Ed.2d 564 (1971). The state has the burden of justifying the warrantless, forcible entry into respondent's motel room. United States v. Killebrew, supra; McDonald v. United States, 333 U.S. 451, 69 S.Ct. 191, 193, 93 L.Ed. 153 (1948). The fact is, however, there is no recognized exception to the warrant requirement that would justify the forced entry into respondent's motel room. "There is no suggestion that anyone consented to the search...The officers were not responding to an emergency...They were not in hot pursuit of a fleeing felon...The goods ultimately seized were not in the process of destruction... Nor were they about to be removed from the jurisdiction..." Vale v. Louisiana, supra, 90 S.Ct. at 1972.

The only justification that the police in the case at bar offered to their act of forcing their way into respondent's room and watching him dress was the assertion that it was done for their personal safety. TP Nov. 18, 8, 9-10. However, this Court has never given approval to police action of forcing their way into a person's home in this manner. Respondent certainly was no danger to the police while he was in his room and they

were on the outside. If respondent had come out of his room after dressing to accompany the police on the search of the car, the police could have protected themselves at that point by making the pat-down search for weapons authorized by Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). It was completely unnecessary and completely unreasonable for the police to force their way into respondent's room under the guise of protecting themselves.

In holding the search illegal, the Supreme Court of Kentucky aptly stated:

[W]e have examined the authorities and are not persuaded that the police are authorized, in anticipation of executing a search warrant upon a person's property in another location, to constantly observe him at a time when he is not under arrest. If such an intrusion were permitted upon the basis of generalized police safety considerations, the police would be authorized to engage in forced, warrantless searches in a multitude of otherwise prohibited circumstances. Cf. Shanks v. Commonwealth, Ky., 504 S.W.2d 709 (1974). A warrantless search upon the basis of a pretextual arrest is invalid. Amador-Gonzalez v. United States, 391 F.2d 308 (CA 5 1968). It follows with greater logical force that a mere apprehension for personal safety, and the opportunity such provides for pretext, is insufficient to create an exception to the warrant requirement. A 7-8.

Underscoring the previously mentioned fact that this case was decided under the Kentucky Constitution, the Supreme Court of Kentucky stated, "We are not willing, however, to recognize

exceptions [to the warrant requirement] so broad as to render meaningless the right secured by the Constitution of Kentucky."

A 8.

The Supreme Court of Kentucky was certainly correct. The constitutional prohibition against unreasonable searches and seizures would be rendered meaningless if the police were authorized to force their way into people's homes without a warrant merely on the assertion that it was necessary for their personal safety. This case provides a glaring example of the dangers of allowing such police conduct. The police were told by a judge that they did not have cause to enter respondent's room. But the police did so anyway asserting that it was for their personal safety. There will be no check at all on the police if they are given a free hand to engage in such conduct.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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COUNSEL FOR RESPONDENT

NO. 89-1182

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

COMMONWEALTH OF KENTUCKY, PETITIONER

v.

CHARLES DAVID JOHNSON, RESPONDENT

CERTIFICATE OF SERVICE

I, Rodney McDaniel, a member of the Bar of this Court, hereby certify that on this 14th day of February, 1990, the attached Brief in Opposition to Petition for Writ of Certiorari, Motion For Leave To Proceed in Forma Pauperis, Affidavit of Indigency, Notice of Appearance, Affidavit of Mailing and Appendix were mailed, first class postage prepaid, to Hon. Valerie L. Salven, Assistant Attorney General of Commonwealth of Kentucky, Capitol Building, Frankfort, Kentucky 40601, counsel for respondent. I further certify that all parties required to be served have been served.

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ASSISTANT PUBLIC ADVOCATE
DEPARTMENT OF PUBLIC ADVOCACY
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FRANKFORT, KENTUCKY 40601

COUNSEL OF RECORD

NO. 89-1182

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

COMMONWEALTH OF KENTUCKY, PETITIONER

v.

CHARLES DAVID JOHNSON, RESPONDENT

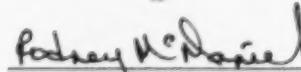
MOTION FOR LEAVE TO
PROCEED IN FORMA PAUPERIS

* * * * *

The Respondent, Charles David Johnson, asks leave to file the attached Brief In Opposition to Petition For a Writ of Certiorari to the Supreme Court of Kentucky without prepayment of costs and to proceed in forma pauperis pursuant to Rule 39.

The Respondent was permitted to proceed as an indigent by the Supreme Court of Kentucky. The Respondent's affidavit in support of this motion is attached.

Respectfully submitted,


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NO.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

COMMONWEALTH OF KENTUCKY

PETITIONER,

VS.

AFFIDAVIT IN SUPPORT OF MOTION
TO PROCEED IN FORMA PAUPERIS

CHARLES DAVID JOHNSON

RESPONDENT.

* * * * *

I, Charles David Johnson, being first duly sworn, depose and say that I am the Respondent in the above-entitled case, and in support of my Motion to proceed without being required to pre-pay fees, costs, or giving security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the costs of prosecuting this proceeding are true.

1. Are you presently employed? NO

Ky STATE REFORMATORY 37.20 PER MONTH

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received. 1981

\$200.00 MONTH

2. Have you received within the past 12 months any income from a business, profession, or other form of self-employment, or in the form of rent payments, interests, dividends, or other source? NO

3. Do you own any cash or checking or savings accounts?

NO

4. Do you own any real estate, stocks, bonds, notes, automobiles or other valuable property (excluding ordinary household furnishings and clothing)? NO

5. List the persons who are dependent upon you for support and state your relationship to those persons.

DAVID ANDREW JOHNSON SON

I understand that a false statement or answer to any questions in this Affidavit will subject me to penalties for perjury.

Charles David Johnson
CHARLES DAVID JOHNSON

SUBSCRIBED AND SWORN to before me by Charles David Johnson on this 9 day of February, 1990.

Linda Burkhalter
NOTARY PUBLIC, STATE AT LARGE

My Commission expires: 3-24-91

APPEARANCE FORM

SUPREME COURT OF THE UNITED STATES

No. 89-1182

Commonwealth of Kentucky
(Petitioner or Appellant)

vs. Charles David Johnson
(Respondent or Appellee)

The Clerk will enter my appearance as Counsel of Record for Charles David Johnson

(Please list names of all parties represented)

who IN THIS COURT is

Petitioner(s) Respondent(s) Amicus Curiae
 Appellant(s) Appellee(s)

I certify that I am a member of the Bar of the Supreme Court of the United States:

Signature Rodney McDaniel

(Type or print) Name Rodney McDaniel

Mr. Ms. Mrs. Miss

Firm Department of Public Advocacy

Address 1264 Louisville Road, Perimeter Park West

City & State Frankfort, Kentucky Zip 40601

Phone (502) 564-8006

ONLY COUNSEL OF RECORD SHALL ENTER AN APPEARANCE. THAT ATTORNEY WILL BE THE ONLY ONE NOTIFIED OF THE COURT'S ACTION IN THIS CASE. OTHER ATTORNEYS WHO DESIRE NOTIFICATION SHOULD MAKE APPROPRIATE ARRANGEMENTS WITH COUNSEL OF RECORD.

ONLY ATTORNEYS WHO ARE MEMBERS OF THE BAR OF THE SUPREME COURT OF THE UNITED STATES MAY FILE AN APPEARANCE FORM.

IT IS IMPORTANT THAT ALL REQUESTED INFORMATION BE PROVIDED.

NO. 89-1182

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

COMMONWEALTH OF KENTUCKY, PETITIONER

v.

CHARLES DAVID JOHNSON, RESPONDENT

AFFIDAVIT PURSUANT TO
SUPREME COURT RULE 29.2

I Rodney McDaniel, being first duly sworn according to law, depose and say:

1. I am a member of the Bar of the Supreme Court of the United States.

2. I am counsel of record for respondent in the above-styled action.

3. The attached Brief In Opposition to Petition for Writ of Certiorari, Motion For Leave To Proceed In Forma Pauperis, Affidavit of Indigency, Notice of Appearance, Certificate of Service and Appendix were deposited in a United States Post Office on High Street, Frankfort, Kentucky 40601.

4. The aforementioned documents were deposited in the United States Post Office, with first-class postage prepaid, and properly addressed to Mr. Joseph F. Spaniol, Jr., Office of the Clerk of the United States Supreme Court, 1 First Street, N.E., Washington, D.C. 20543.

5. The mailing of the aforementioned documents took place on February 14, 1990, at approximately 4:02 p.m., which is within the permitted time set by Rule 15.2.

Rodney McDaniel
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COUNSEL OF RECORD

Subscribed and sworn to before me by Rodney McDaniel on this 14th day of February, 1990.

Madelia E. Jones
NOTARY PUBLIC, STATE AT LARGE

My Commission Expires: March 31, 1993

NO. 89-1182

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

COMMONWEALTH OF KENTUCKY, PETITIONER

v.

CHARLES DAVID JOHNSON, RESPONDENT

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Supreme Court of Kentucky

No. 88-SC-184-DG & 88-SC-425-DG

COMMONWEALTH OF KENTUCKY

APPELLANT

v.

ON APPEAL FROM THE COURT OF APPEALS

CHARLES DAVID JOHNSON

APPELLEE

AND

CHARLES DAVID JOHNSON

CROSS-APPELLANT

v.

ON CROSS APPEAL FROM THE COURT OF APPEALS

COMMONWEALTH OF KENTUCKY

CROSS-APPELLEE

OPINION OF THE COURT BY JUSTICE LAMBERT

AFFIRMING IN PART AND REVERSING IN PART ON APPEAL

AFFIRMING ON CROSS APPEAL

The primary issue in this case is whether certain evidence used against appellant was lawfully obtained. On two separate occasions, three days apart, appellant was found to be in possession of illegal drugs, drug paraphernalia, and in the first instance, a handgun. The trial court overruled both of appellant's motions to suppress the evidence, but the Court of Appeals reversed holding that the police officer's act of shining a flashlight into a darkened hotel room, and their act of forcing their way into another hotel room, violated Section 10 of the

Kentucky Constitution and the Fourth Amendment to the Constitution of the United States. We granted the Commonwealth's motion for discretionary review to consider the issues it presented. We likewise granted appellant's cross-motion for discretionary review to consider his claims of trial error.

I. Evidence Obtained at the Penny Pincher Motel

At approximately 6:00 a.m. on September 14, 1985, the Erlanger police were summoned to the motel in response to a complaint from a guest of a disturbance. The guest had reported that someone was beating on his door with a baseball bat. Upon the officers' arrival, appellant was found standing in an outside hallway between two motel rooms. One of the police officers knew appellant to be a drug user and perceived him to be under the influence of drugs at that time. During questioning, the police learned that appellant's room was number 165 and observed that the door was slightly ajar. While one officer talked with the appellant and asked for his identification, the other shined a flashlight through the partially open door into the darkened room. Just inside the door on a table top, the officer observed drug paraphernalia and a white powder substance. After this discovery, the officer noticed an opening in the window curtain. As he had done before and without entering the room, he shined his flashlight through the window and observed a handgun under the bed. Appellant was arrested, the police obtained a search warrant, and upon their search, cocaine, drug paraphernalia, and a handgun were found. Subsequently, appellant was convicted of

various drug possession offenses and possession of a handgun by a convicted felon.

Prior to trial, appellant moved the court to suppress the evidence. His motion was denied. On appeal, however, the Court of Appeals reversed. It held that the act of shining a flashlight beam into a darkened room amounted to a warrantless search in violation of appellant's constitutional rights.

At the outset we must determine whether the act complained of constitutes a search within contemplation of the Fourth Amendment and Section 10 of the Constitution of Kentucky. From the facts presented the police were entirely within their rights to go upon the motel premises and to the location where appellant was encountered. A disturbance had been reported to them and their assistance had been requested by the management of the motel. Upon seeing appellant in the hallway at or near the location of the reported disturbance and upon discerning that he appeared to be under the influence of drugs, their attention was naturally drawn to him, and by virtue of his whereabouts, to his room.

By design, rooms in modern motels are easily accessible and in close proximity to places of public passage. Many such rooms have picture windows with only a curtain to prevent public view. Without diminishing an individual's right to be protected from an unreasonable search of his motel room, Stoner v. California, 376 U.S. 483, 84 S.Ct. 889, 11 L.Ed.2d 856 (1964), we note that when one takes lodging in a motel it is with the certain knowledge that substantial numbers of persons unknown to him will be nearby and in a position to invade his privacy unless

caution is exercised to prevent it. As such, what would be sufficient vigilance to preserve one's privacy in a home, apartment or office may be insufficient in a motel room. This view was recognized in People v. Berutko, Ca., 453 P.2d 721 (1969), as follows:

Essential to the determination of reasonableness in cases wherein officers obtain probable cause for arrest through their own observation is a consideration of the degree of privacy which a defendant may reasonably expect in a given enclosure accepted by him, whether or not that enclosure be his residence. (Emphasis added.)

In those instances when the police have a legitimate reason for their presence on the motel premises, we are without reluctance in holding that one who asserts that his rights have been violated by an unreasonable search accomplished by looking through a motel room window or door must show that he took precautions sufficient to create an objectively reasonable expectation of privacy. Otherwise, that which was seen was in plain view. Harris v. U.S., 390 U.S. 234, 88 S.Ct. 992, 19 L.Ed.2d 1067 (1968).

Having concluded that appellant's act of leaving his motel room door and window partially open to public view deprived him of a reasonable expectation of privacy, of what significance then is the police officer's use of a flashlight to look inside? In Texas v. Brown, 460 U.S. 730, 103 S.Ct. 1535 75 L.Ed.2d 502 (1983), the Supreme Court broadly declared that "...the use of artificial means to illuminate a darkened area simply does not constitute a search, and thus triggers no Fourth Amendment

protection." Likewise, in U.S. v. Richardson, 388 F.2d 842 (CA6 1968), the court held that use of ultra-violet light to determine if the defendant had touched a bank bag dusted with fluorescein powder was not a search within the fourth amendment. This court reached a similar result in Rudolph v. Commonwealth, Ky., 474 S.W.2d 376 (1971), but our holding was premised on the officer's legitimate concern for his safety as a reason for his use of a flashlight. We are now of the opinion that a determination of whether or not contraband is in plain view should not depend on existing lighting conditions or the time of day. One seeking to maintain his privacy should reasonably expect that persons disposed to look inside a motel room will not hesitate to enhance their visibility by use of a widely available device such as a flashlight. In Texas v. Brown, supra, in commenting upon the fact that the officer "bent down at an angle so [he] could see what was inside," the court said:

The general public could peer into the interior of Brown's automobile from any number of angles; there is no reason Maples should be precluded from observing as an officer what would be entirely visible to him as a private citizen.

In Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971), in its plurality opinion the court set forth three requirements for a valid plain view seizure. These requirements are: prior justification for the officer's presence, inadvertence of discovery, and immediate apparentness that evidence has been found. Observation of these limitations provides sufficient protection for the public as guaranteed by

Section 10 of the Constitution of Kentucky and the Fourth Amendment to the Constitution of the United States. On this issue we reverse the Court of Appeals.

II. Evidence Obtained at The Ramada Inn

On September 17, 1985, three days after appellant's arrest at the Penny Pincher Motel and following his release on bond, an off duty police officer observed appellant in the parking lot of the Ramada Inn. Upon probable cause, the sufficiency of which is not at issue here, the police obtained a warrant to search appellant's automobile.* Prior to commencement of the search, the officer went to appellant's motel room to inform him of the warrant and give him an opportunity to accompany them to the car and provide the keys.

Upon arrival at appellant's motel room, and consistent with what appears to be his normal practice, the police discovered the door standing slightly open. The officer knocked on the door and appellant, wearing only undershorts and a pair of boots, stepped out into the hallway. When informed of the search warrant for his car, appellant indicated he would provide a key and that he wanted to accompany the officers to observe the search. Attempting to re-enter his room to dress and obtain his keys, appellant discovered that he had locked himself

*In addition to appellant's automobile, the police sought a warrant to search his motel room. The district judge to whom the affidavit was presented determined that probable cause was not shown for a search of the room and declined to issue the warrant.

out. As his attire was unsuitable for public activity and he did not have his keys on his person, one of the police officers offered to obtain a key from the motel office. Upon the officer's return with the passkey, appellant entered his room and attempted to slam the door behind him. One of the officers prevented the door from closing and the officers then forcibly entered the room. Once inside, the police discovered drugs and drug paraphernalia.

The Commonwealth argues that the police were entitled to force their way into the motel room to protect their personal safety. We are reminded that just three days earlier appellant had been found in possession of a handgun and the Commonwealth reiterates that appellant had stated he wished to accompany the police during the automobile search. On the theory that appellant would enter his room and return with a gun or other weapon, the Commonwealth argues that Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) and Michigan v. Long, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983), authorized the police to maintain observation of appellant while he was inside his room. As such observation could only be accomplished by entering the motel room, the Commonwealth argues, the police were within their rights to force their way inside.

We need not burden this opinion with a review of the various exceptions to the warrant requirement of the United States and Kentucky Constitutions. It is sufficient to say that we have examined the authorities and are not persuaded that the police are authorized, in anticipation of executing a search warrant upon a person's property in another location, to

constantly observe him at a time at which he is not under arrest. If such an intrusion were permitted upon the basis of generalized police safety considerations, the police would be authorized to engage in forced, warrantless searches in a multitude of otherwise prohibited circumstances. Cf. Shanks v. Commonwealth, Ky., 504 S.W.2d 709 (1974). A warrantless search upon the basis of a pretextual arrest is invalid. Amador-Gonzalez v. United States, 391 F.2d 308 (CA5 1968). It follows with greater logical force that a mere apprehension for personal safety, and the opportunity such provides for pretext, is insufficient to create an exception to the warrant requirement.

By the views expressed in this opinion, we do not denigrate the legitimacy of police officers' concern for their personal safety. We recognize, however, that preservation of constitutional rights frequently conflicts with an officer's perception of his need to protect himself. This court and other courts have willingly found exceptions to various constitutional provisions to better insure the safety of police officers. Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 407, 9 L.Ed.2d 889 (1968); Pennsylvania v. Mimms, 434 US 106, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977); Adams v. Williams, 407 US 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972); Phillips v. Commonwealth, Ky., 473 S.W.2d 135 (1971); Rudolph v. Commonwealth, Ky., 474 S.W.2d 376 (1971). We are not willing, however, to recognize exceptions so broad as to render meaningless the right secured by the Constitution of Kentucky.

Without expressing any view as to the result which would be reached in this case by application of the Fourth

Amendment to the Constitution of the United States and applicable decisions of Federal Courts, we hold that the warrantless, forced entry by the police into appellant's room at the Ramada Inn, violated Section 10 of the Constitution of Kentucky, and the evidence found therein must be suppressed. On this issue we affirm the Court of Appeals.

III. Issues on Cross-Appeal

Appellant first contends that the trial court erred to his prejudice by permitting a police officer to testify that when appellant's room was searched, the police wore rubber gloves because they had heard he "...might have AIDS or some other disease." In Wiggins v. Maryland, Md.Ct.App. 57 USLW 2539 (March 7, 1989)(No. 94-1988), the court noted that "...a climate of fear still surrounds the disease," and held

it is not far-fetched that the jury, observing the (rubber) gloves, thought it better in any event, that the defendant be withdrawn from public circulation and confined in an institution with others of his ilk.

We agree with the Maryland Court that raising the specter of AIDS, without substantial relevance in bringing this to the attention of the jury, may result in unfair prejudice. In this case, however, the trial court's error in the admission of this evidence was harmless. RCr 9.24 Appellant was convicted of possession of cocaine, possession of drug paraphernalia, and possession of a handgun by a convicted felon. The evidence of his guilt was overwhelming and his substantial rights were not affected.

Finally, appellant's claim that he was prejudiced by evidence that his home had been searched by the police on an earlier occasion is without merit for two reasons. First, the absence of any carpentry tools at appellant's place of dwelling was relevant to rebut his testimony that he worked as a carpenter. Second, defense counsel raised an issue concerning police surveillance of appellant. The Commonwealth was thus entitled to explain that their surveillance resulted in the issuance of a search warrant. Moreover, the fact that no evidence of criminal activity was found at appellant's residence may have been to his advantage. Certainly, we are unprepared to say that he was prejudiced by this testimony.

Conclusion

For the foregoing reasons and as set forth herein, upon the Commonwealth's appeal, we affirm in part and reverse in part; upon the cross appeal by appellant, we affirm. This cause is remanded to the trial court for further proceedings in conformity herewith.

As to Section I, all concur except Combs, J., not sitting. As to Section II, Lambert, Leibson and Vance, JJ., concur; Wintersheimer, J., dissents by separate opinion in which Stephens, C. J., and Gant, J., join; Combs, J., not sitting. On this issue the Court of Appeals is affirmed by an equally divided Court. As to Section III, all concur except Combs, J., not sitting.

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RENDERED: June 8, 1989
 TO BE PUBLISHED

Supreme Court of Kentucky

88-SC-184-DG & 88-SC-425-DG

COMMONWEALTH OF KENTUCKY

APPELLANT

ON REVIEW FROM COURT OF APPEALS
v. 86-CA-748-MR
(Kenton Circuit Court #85-CR-195)

CHARLES DAVID JOHNSON

APPELLEE

AND

CHARLES DAVID JOHNSON

CROSS-APPELLANT

ON REVIEW FROM COURT OF APPEALS
v. 86-CA-1305-MR
(Kenton Circuit Court #85-CR-195)

COMMONWEALTH OF KENTUCKY

CROSS-APPELLEE

DISSENTING OPINION BY JUSTICE WINTERSHEIMER

I respectfully dissent from that part of the majority opinion which affirms the decision of the Court of Appeals in regard to the suppression of evidence obtained from a search of the Ramada Inn hotel room. The trial judge correctly overruled the defendant's motion to suppress evidence obtained in the search.

I specifically and strongly reject any implication from the majority opinion that this search was a pretext. The determination of whether a search is reasonable under the circumstances

is predominantly factual and should stay in the hands of the trial judge. A reviewing court should not substitute its findings for those of the trial judge. The trial judge is in the best position to ascertain the facts. Cf. CR 52.01.

When a reasonably prudent police officer believes that his safety or that of others is in danger, he may make reasonable search for weapons of a person believed by him to be armed and dangerous regardless of whether he has probable cause to arrest that individual. This is true even though the officer is not absolutely certain that the individual is armed, although he must secure a warrant when practical before making search or arrest. Phillips v. Commonwealth, Ky., 473 S.W.2d 135 (1971). When such a search of a person that an officer believes is armed is confined to what is minimally necessary to determine whether the party is armed for the purposes of protecting the officer, the search is reasonable. Phillips, supra; Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). The real dangers with which police officers are confronted in their work on a daily basis cannot be ignored. Here the officers knew that a gun had been found in Johnson's motel room only three days earlier at the Pennypincher in Erlanger. The Fourth Amendment to the United States Constitution does not require a police officer who lacks the precise level of information necessary for probable cause to simply allow a crime to occur or a criminal to escape. Terry, supra, recognizes that an intermediate response may be

appropriate and that a brief stop of a suspicious individual in order to maintain the status quo momentarily while obtaining more information may be reasonable in the light of the facts known to the officers at the time. Adams v. Williams, 406 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 616 (1972).

Johnson was not a less dangerous suspect by the mere fact that he was not under arrest when the officers asked him for the keys to his car. Other state courts have found it reasonable to permit police officers to protect themselves while they are still investigating a possible crime. See Commonwealth v. Daniels, 280 Pa. 278, 421 A.2d 721 (1980); State v. Mayfield, 10 Kans.App. 2d 175, 694 P.2d 915 (1985). The reasoning of the Pennsylvania and Kansas courts was sensible and correct and properly persuasive when applied to the actions of the police in this case.

The United States Courts of Appeals have recently indicated that a protective search can be appropriate in certain circumstances. See United States v. Johnson, 637 F.2d 532 (8th cir. 1980); United States v. McClinnhan, 660 F.2d 500 (D.C. cir. 1982).

The United States Supreme Court has recognized that suspects may injure police and others by virtue of their access to weapons even though they may not be armed. Michigan v. Long, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983). The U.S. Supreme Court determined that an interpretation of Terry, supra, need not restrict the preventative search to the person of the

detained subject. If a suspect is dangerous, he is no less dangerous simply because he is not arrested.

The United States Supreme Court has applied a common sense approach to this dangerous and delicate area of constitutional interpretation. A proper interpretation of Section 10 of the Kentucky Constitution and the Fourth Amendment to the Federal Constitution both provide reasonable protection for police in exercising a protective search. The police entry into Johnson's Ramada Inn room was perfectly reasonable to assure that he did not emerge with gun in hand.

I would reverse the decision of the Court of Appeals and reinstate the judgment of the circuit court.

Stephens, C.J., and Gant, J., join in this dissent.

COMMONWEALTH OF KENTUCKY
COUNTY OF KENTON

FILED
KENTON CIRCUIT/DISTRICT COURT
SEP 17 1985 IN SUPPORT OF
ED SCHROEDER, SEARCH WARRANT
DC

Comes the Affiant, and states that the information contained herein was received and made in his capacity as a Peace Officer. Affiant's name is

Chief Genz Weaver, Ft. Wright Police Dept. and Affiant believes there is

(on or in the premises numbered) (in the vehicle) (on the person of)
CHARLES Johnson And A 1985 Cadillac Eldorado
D.O.B. 8-17-38 Ohio License 431-KCA
Room 329 Ramada Inn Serial # on V.N. #
Ft. Wright, Kentucky 1G6EL5780FF663976

more particularly described as
A Blue bottom with a white vinyl top Cadillac bearing the above
LICENCE Number And VIN Number PRESENTLY located in the Room
INN Parking Lot. Said Room is located in the Ramada Inn, Ft. Wright
Kenton County, Kentucky.

the following property

Coinage and Doug paraphernalia, both of which are controlled
under K.R.S. 218A.140.

which property affiant believes to be:

(stolen) (things used as the means of committing a crime) (things in the possession of a person who has intention to use as means of committing a crime or in the possession of another to whom any person may have delivered it for purpose of concealing it or preventing its being discovered) (things which consist of evidence which tends to show that a crime has been committed or that a particular person has committed a crime) (contraband).

Affiant further states that on the date and at the time of

Sept. 17, 1985 at 4:00 a.m. (p.m.) affiant received information from/observed:
The Affiant is the Chief of Police of the Ft. Wright, Kenton
County, Kentucky, Police Department. The Affiant received information
from Officer Ron Weithofer that at approximately 11:30 A.M. on
today's date he observed Charles Johnson in the lobby of the Ramada Inn.

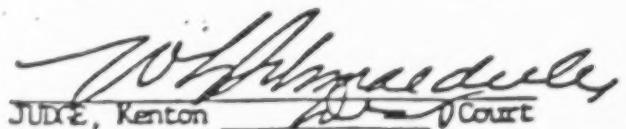
Officer Weitholter stated to the Affiant that Chester Johnson parked the lobby looking in all directions out the window. Charles Johnson then left the lobby and approached the above described vehicle. Mr. Johnson then opened the trunk of the vehicle and lifted the floor mat up and then removed the side cardboard panel in the trunk compartment. Mr. Johnson then placed a brown package in said compartment in a manner which Officer Weitholter believed he was attempting to hide said package. Mr. Johnson then removed some clothing from the front of the vehicle and then placed them over the mat. The entire time Mr. Johnson was constantly looking in all directions in what appeared to be an effort to see if anyone was watching him. The Affiant knows Charles Johnson and at present presently knows that Mr. Johnson has been arrested in Eastondale, Ill. for possession of cocaine and at present in the custody of the State Troopers in Larue county, and in addition Mr. Johnson was arrested on 9-14-55 for possession of cocaine. Mr. Johnson is a known drug user and trafficker in cocaine. There after the Affiant contacted Officer Doug Eldridge of the Greater Cincinnati International Airport Police Dept. in order that Officer Eldridge and his dog Pepper, which is trained

to detect marijuana, hash, heroin, and cocaine and is certified by North American Police Workdog Association to detect said drugs and was re-certified on September 18, 1985 in order that they could make an external search of the above described Cadillac. Officer Eldridge and Pepper walked around the vehicle and when Pepper reached the trunk area of the vehicle Pepper made an indication that a controlled substance was present. Upon further detection Pepper further indicated that a controlled substance was located in the vehicle. Charles Johnson is registered in the above described room under the name of David Johnson. It is Affiant's belief that these are controlled substances located in the above described vehicle and room in violation of K.R.S. 218A.140.

Affiant believes his informant to be reliable and truthful because


Paul Weaver
AFFIANT

Subscribed and sworn to before me this 17 day of Sept 1985, at 8:10 a.m. (p.m.)


W. W. M. Steele
JUDGE, Kenton
Court

THE COMMONWEALTH OF KENTUCKY

DEFENDANT'S EXHIBIT

PART

B d/r

TO ANY POLICEMAN, SHERIFF, CONSTABLE, or other PEACE OFFICER

COMMONWEALTH OF KENTUCKY:

FILED
KENTON CIRCUIT/DISTRICT COURT

17 1985
ED SCHROEDER CLERK

DC

Application, by affidavit, for a Search Warrant having been made this date, and it appearing that probable cause has been stated by the affiant,

Chief G. W. Weaver, F. Wright P.D., you are therefore commanded to search

(on or in the premises numbered) (in the vehicle) (on the person of)

A 1985 Cadillac Eldorado

Ohio License - 431-KBA

Serial # or VIN # 1G6EL5780FF663976

more particularly described as
A blue bottom with a white vinyl top Cadillac bearing the
above license number and v.i.n. number presently located in the
Ramada Inn parking lot.

for the following property
Cocaine and Drug paraphernalia, both of which are controlled
under K.R.S. 218A.140.

and to safely hold any thereof you may find until further order of a Court of Competent Jurisdiction, said property constituting evidence of an offense against the peace and dignity of the COMMONWEALTH OF KENTUCKY.

Witness my hand this 17 day of Sept 85

Executed this warrant
this _____ day of

19, at _____
a.m./p.m.

W. J. Adams, Jr.
JUDGE, Kenton Sept 85 Court
Second Division